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McDERMOTT, WILL & EMERY 600 13Th Street, N.W. Washington, DC 20005-3096				EXAMINER HAIDER, FAWAAD
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte SERGEY N. RAZUMOV

Appeal 2008-0121
Application 09/891,321
Technology Center 3600

Decided: June 26, 2008

Before MURRIEL E. CRAWFORD, DAVID B. WALKER, and JOHN C. KERINS, *Administrative Patent Judges*.

WALKER, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. §§ 6(b) and 134(a) (2002) from the final rejection of claims 14-26 and 31. The Appellant presented oral argument on June 19, 2008.

Appellant claims a system for selling goods, comprising an electronic device configured to enable a customer to access a group of items pre-selected for the customer based on an evaluation made when the goods are tried on by a human model having similar individual characteristics as the

customer. The evaluation may be performed by the human model trying on the goods to evaluate whether the goods fit the customer or by experts evaluating whether the goods are suitable for a human model trying on the goods (Specification 3). Claim 14, reproduced below, is representative of the subject matter on appeal.

14. A method of selling goods, comprising the steps of:

selecting human models representing categories of a pre-set classification of goods,

trying on the goods by the human models of the respective categories, at least one model is assigned for trying on goods that belong to a category of the classification,

obtaining body measurements of a customer to determine to which category in a pre-set classification of goods the customer belongs,

based on the body measurements, assigning by a computer system to the customer the category that corresponds to a human model having individual characteristics corresponding to the body measurements of the customer,

determining by the computer system quantitative evaluation marks for the goods in the category assigned to the customer, each evaluation mark being in a range from a lower mark to a higher mark, the evaluation marks being pre-set based on evaluating the goods tried on by the respective model, pre-selecting by the computer system based on the determined evaluation marks, a group of items among the goods in the category assigned to the customer, and enabling the customer to access said group of items.

The references set forth below are relied upon as evidence of unpatentability:

Weaver	US 6,404,426 B1	Jun. 11, 2002
Gazzuolo	US 6,546,309 B1	Apr. 8, 2003

Andrew Bailey, Jr., *Accounting and the Internet*, New Accountant 5-8 (1998).

Claims 14-20, 22, 24-26, and 31 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Bailey in view of Gazzuolo. Claims 21 and 23 stand rejected under 35 U.S.C. § 103(a) as unpatentable over Bailey in view of Gazzuolo and Weaver.

“Section 103 forbids issuance of a patent when ‘the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.’” *KSR Int'l Co. v. Teleflex Inc.*, 127 S.Ct. 1727, 1734 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, (3) the level of ordinary skill in the art, and (4) where in evidence, so-called secondary considerations. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). *See also KSR*, 127 S.Ct. at 1734 (“While the sequence of these questions might be reordered in any particular case, the [*Graham*] factors continue to define the inquiry that controls.”)

In rejecting claims under 35 U.S.C. § 103(a), the examiner bears the initial burden of establishing a prima facie case of obviousness. *In re Oetiker*, 977 F.2d 1443, 1445 (Fed. Cir. 1992). *See also In re Piasecki*, 745

F.2d 1468, 1472 (Fed. Cir. 1984). Only if this initial burden is met does the burden of coming forward with evidence or argument shift to the appellant. *Id.* at 1445. *See also Piasecki*, 745 F.2d at 1472. Obviousness is then determined on the basis of the evidence as a whole and the relative persuasiveness of the arguments. *See Oetiker*, 977 F.2d at 1445; *Piasecki*, 745 F.2d at 1472.

Appellant argues that the Examiner incorrectly found that Bailey's system involves assigning customers human models of a corresponding size (Br. 9). We agree. Neither Bailey nor Gazzulo teach "assigning by a computer system to the customer the category that corresponds to a human model having individual characteristics corresponding to the body measurements of the customer," as required by claim 14, from which all appealed claims depend. Each of the asserted references teaches generating a computer model from actual customer measurements, not using human models to try on garments (Bailey, 7; Gazzulo, col. 1, l. 55 – col. 2, l. 12; Weaver, abstract).

Gazzulo teaches a virtual fitting room that enables accurate size prediction and analysis of fit of a garment on a user. A database of body scan fit models is developed to enable both scanned and unscanned users to virtually try-on clothing in the virtual fitting room. A database of visual fit models also is created to allow users to visualize the fit of the garments on themselves. Each visual fit model is preferably created with several different skin tones and hair styles. A database of garment models is also created by a visualization designer, who will review information such as a manufacturer's garment specifications, grading rules, sizing information, fit model, and fit of the actual garments on the fit model to develop garment

models for each of the garments available for virtual try on (Gazzuolo, col. 1, l. 55 – col. 2, l. 12). The models referred to in Gazzuolo are computer models, not human models.

Bailey discusses a Virtual Clothiers website, wherein a customer is given access to a wide variety of catalogues containing clothes in various styles. Clothing is projected as a 3D model that can be rotated for multiple views on the customer's own home computer. Video and sound clips are available to display and describe the clothing on human models with varying physical characteristics to allow the customer to gain a better idea of how the clothing might look on them. Having selected some clothes, the customer is asked to make choices about materials, colors, style options, and body measurements. Based on this data, the resulting garment is presented for inspection on an appropriately proportioned computer generated model (Bailey, 6-7). Although video and sound clips are available to show the clothing on human models, the clips are selected by the customer for viewing or listening, and there is no teaching to assign by the computer system a category to the customer that corresponds to a human model having individual characteristics similar to the body measurements of the customer.

Weaver is directed to a method and system for a computer-rendered three-dimensional mannequin. The computer model of a person is rendered by any appropriate computer software for creating and displaying three-dimensional models. The model initially is created based on measurements, and accurately depicts the sizing and proportion of the subject person or the model may be based on standard sizes (Weaver, col. 4, ll. 8-14).

Because none of the cited references teaches “assigning by a computer system to the customer the category that corresponds to a human model

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having individual characteristics corresponding to the body measurements of the customer,” as required by claim 14, the Examiner has failed to make a *prima facie* case of obviousness over Bailey in view of Gazzuolo with respect to claim 14. Because each of the remaining claims depends from claim 14 and Weaver does not remedy the deficiencies of the combination of Bailey and Gazzuolo, the Examiner has failed to make a *prima facie* case of obviousness 1) over Bailey in view of Gazzuolo with respect to claims 15-20, 22, 24-26, and 31; and 2) over Bailey in view of Gazzuolo and Weaver with respect to claims 21 and 23.

The decision of the Examiner is reversed.

REVERSED

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McDERMOTT, WILL & EMERY
600 13th Street, N.W.
Washington, DC 20005-3096